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NO. 79-2003

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

THE STATE OF CALIFORNIA,

Petitioner,

v.

RONALD EUGENE LANPHEAR,

Respondent.

On Petition for Writ of Certiorari
to the California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
STATEMENT OF CASE	1
STATEMENT OF FACTS RELATING TO CHARGED OFFENSES	2
STATEMENT OF FACTS RELATING TO THE EXCUSALS OF PROSPECTIVE JURORS HOLLEY AND HAYTER	2
IN LIGHT OF THE CALIFORNIA SUPREME COURT'S UNANIMOUS FINDING THAT TWO PROSPECTIVE JURORS WERE IMPROPERLY EXCLUDED UNDER WITHERSPOON V. ILLINOIS (1968) 391 U.S. 510, THE PETITION FOR CERTIORARI SHOULD BE DENIED	7
ALTERNATIVELY, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE HELD WITHOUT ACTION PENDING THE CALIFORNIA SUPREME COURT'S DECISION IN PEOPLE V. VELASQUEZ ON REMAND (CALIFORNIA V. VELASQUEZ, NO. 79-1677, 48 U.S.L.W. 3849)	9

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TABLE OF AUTHORITIES

	Pages
Cases	
Adams v. Texas 48 U.S.L.W. 4869 (U.S., June 25, 1980)	2, 7, 8, 9
California v. Velasquez No. 79-1677 48 U.S.L.W. 3849	8, 9, 10
People v. Lanphear (1980) 26 Cal.3d 814	1, 8, 10
People v. Velasquez (1980) 26 Cal.3d 425	8, 9, 10
Witherspoon v. Illinois (1968) 391 U.S. 510	4, 7, 8
Statutes	
Cal. Pen. Code, §§ 187	1
190	1
191	1
211	1
1239(b)	1
Stats. 1977, c. 316, §§ 5, 7, 9	1
Rules	
Rules of the U.S. Supreme Court, rule 22.6	10

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STATEMENT OF CASE

On April 10, 1980, following respondent's automatic appeal to the California Supreme Court (Cal. Pen. Code, § 1239(b)), said court reversed the judgment of death imposed by the Superior Court of San Bernardino County, California in People v. Ronald Eugene Lanphear; San Bernardino County Superior Court case number CR 35417. In all other respects respondent's convictions of one count of first degree murder (Cal. Pen. Code, § 187) committed under "special circumstances" (Cal. Pen. Code, §§ 190-191.1, 190.2 subd. c(3)(i); added by Stats. 1977, c. 316, §§ 5, 7 and 9) and one count of robbery (Cal. Pen. Code, § 211) were affirmed. (People v. Lanphear (1980) 26 Cal.3d 814.)

On June 3, 1980, Justice Rehnquist, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit granted petitioner's request for a stay of the execution and enforcement of the judgment of the California Supreme Court pending this court's decision in Adams v. Texas, No. 79-5175 and the timely filing and disposition of a petition for writ of certiorari in the instant case. On June 25, 1980 this Court rendered its decision in Adams v. Texas, 48 U.S.L.W. 4869 reversing the judgment of the Texas Court of Criminal Appeals to the extent that it sustained the imposition of the death penalty. (Adams v. Texas, supra, 48 U.S.L.W. at p. 4872.)

STATEMENT OF FACTS RELATING TO CHARGED OFFENSES

For purposes of this brief respondent adopts petitioner's statement of facts as they pertain to the commission of the charged offenses.

STATEMENT OF FACTS RELATING TO THE EXCUSALS OF PROSPECTIVE JURORS HOLLEY AND HAYTER

Jury selection took three days to complete. In addition to an original panel (CT 57; RT 36-42),[1/] two supplemental panels were called (CT 58, 65; RT 97-99, 427, 430). Prior to commencing the actual selection process, the prosecutor inquired as to the court's practice in questioning potential jurors regarding their attitudes towards the death penalty. Although the district attorney indicated he had used a "series

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1. The designation "CT" refers to the Clerk's Transcript on appeal. The designation "RT" refers to the Reporter's Transcript on appeal.

of [specific] questions in the past," the court explained that its practice was to conduct its own voir dire and that the attorneys would be permitted to proceed once the court had completed its questioning (RT I 30).

With only minor variation, the court went through a set routine with all three jury panels as to its prefatory remarks, its own preliminary questioning of individual jurors, and the order in which counsel were then allowed to conduct their individual voir dire (RT 35-59).[2/] During preliminary questioning prospective juror # 91, Charles Kirschner, asked whether the case involved capital punishment. The court immediately informed the members of the panels then present that the subject of capital punishment would be considered at a later time in the voir dire proceedings (RT 108).

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2. This process was repeated with each of the two supplemental panels (RT 91-99; RT 430-452).

The court continued with its preliminary remarks, including statements regarding the presumption of innocence and burdens of proof (RT 127-132), and alluded to the fact that appellant was charged with murdering Robert Unger. Inquiries were also made with respect to the panel's prior knowledge of the facts of the case (RT I 133-136).

With respect to juror attitudes concerning the death penalty the court stated:

> "Now, back to the problem at hand. When we come to the business of the death penalty, the law requires that since a jury is going to have to wrestle with this decision that the jury be able to wrestle with the decision. It would not be appropriate for us to have someone on the jury whose religious beliefs or moral feelings, or whatever source of beliefs are such that under no circumstances, no matter what the facts were, no matter what happened, could they even take part in any deliberations that might lead to a death penalty.
>
> "If anybody has feelings that are that strong, then obviously, they should not serve on a jury. Because before we even start, we are in a position where we are going to maybe have a hung jury or could not possibly arrive at the possible alternatives no matter what the evidence shows.
>
> "And I understand that there are some religions I have heard people say, that there are some people who for religious beliefs, whatever they feel they just cannot take part in any such deliberations. And I would like a show of hands of all of you who feel that your personal convictions or personal beliefs or whatever are such that you could not under any circumstances no matter what the evidence showed, even take part in the deliberations which might lead to a death penalty. If so, raise your hands?" (RT I 144-145; emphasis added.) 3/

At this juncture juror # 83, Elizabeth Clark, stated that she did not believe in capital punishment and that

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3. The court's remarks were directed towards determining juror attitudes per Witherspoon v. Illinois (1968) 391 U.S. 510.

regardless of what facts and circumstances were presented at trial she could not participate in any deliberations which might lead to a death penalty. She was then excused for cause (RT 145-146). Juror # 91, Charles Kirschner, voiced similar attitudes stating that as a matter of conscience he subscribed completely to the court's statement (see RT 144-145, supra). He was also excused for cause (RT 146).

Wesley Holley, juror # 37, then asked the court for further clarification: "If the trial came to the third stage that you spoke of, where there was a choice between life and death sentence, does the jury have any degree of selection there?" (RT 146:20-22.) The following colloquy ensued resulting in Holley's exclusion for cause.

"THE COURT: It is absolutely up to the jury.

"MR. HOLLEY: I mean --

"THE COURT: -- What I'm telling you, now, has nothing to do with what your decision would be. That is entirely up to the jury. All we want to know is that you would be capable of taking part in deliberations, which may eventually end up with the vote for the death penalty?

"MR. HOLLEY: I don't believe I could, sir.

"THE COURT: I appreciate that, Mr. Holley, is it?

"MR. HOLLEY: Yes, sir.

"THE COURT: Thank you, you are excused, would you go to the jury assembly room and let them know?" (RT 146-147; emphasis added.)

In questioning the remaining members of the first two panels, as it had done in response to Mr. Holley's inquiry, the court shifted its emphasis from whether there were prospective jurors who could not "under any circumstances" impose the death penalty to whether any jurors had "feelings" which they thought would prevent them from taking part in such deliberations. Thus, the court declared: "[i]f you have any

feelings that you think would prevent your taking part in in deliberations which might lead to the death penalty, it your feelings are that strong, why let us know" (RT 147:11-14; emphasis added).

Juror # 33, Myron Hayter, then stated: "Sir, I don't believe that I could" (RT 147:16).

> "THE COURT: All right, is this because of your personal convictions or religious beliefs or what?
>
> "MR. HAYTER: Religious beliefs, I'm a born again Christian. I just don't believe I could have any part in the sitting in on the electric chair, sending anyone.
>
> "THE COURT: Incidently, Mr. Broderick, I haven't asked you on these other cases if you want to question any of these people further before I excuse them, why if you let me know, I will give you that privilege.
>
> "MR. BRODERICK: I will, Your Honor.
>
> "THE COURT: All right, sir, thank you, Mr. Hayter. You are excused, would you go to the jury assembly room and let them know." (RT 147:19-148:6; emphasis added.)

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IN LIGHT OF THE CALIFORNIA SUPREME COURT'S UNANIMOUS FINDING THAT TWO PROSPECTIVE JURORS WERE IMPROPERLY EXCLUDED UNDER WITHERSPOON V. ILLINOIS (1968) 391 U.S. 510, THE PETITION FOR CERTIORARI SHOULD BE DENIED

Witherspoon v. Illinois (1968) 391 U.S. 510 Court established stringent federal constitutional restrictions upon the practice of death-qualifying capital juries. Prospective jurors with scruples against the death penalty may not be excused for cause on this basis unless they have:

> "[M]ade unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them; or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (391 U.S. 522-523, fn. 21; emphasis in original.)

Recently, this Court reaffirmed its Witherspoon holding by stating: "As an initial matter, it is clear beyond peradventure that Witherspoon is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Witherspoon v. Illinois, supra, at 522, n. 21." (Adams v. Texas, supra, 48 U.S.L.W. 4872; emphasis added.)

To permit the enforcement of a death sentence imposed or recommended by a jury from which veniremen were excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" (Witherspoon v. Illinois, supra, at p. 522) "would deprive him [a defendant] of his life without due process of law" (391 U.S. at p. 523).

Contrary to petitioner's contention (Pet. for Cert., p. 16), the California Supreme Court has not "interpreted

Witherspoon to require an unrealistic degree of certainty on the question of whether a juror may be excused for cause" based upon his attitude toward the death penalty. Rather, the California court has simply reaffirmed this Court's refusal to enforce a death sentence from which prospective jurors had been barred from service "on 'any broader basis' than [their] inability to follow the law or abide by their oaths . . ." (Adams v. Texas, supra, 48 U.S.L.W. 4872.) The California Supreme Court conducted a painstakingly detailed examination of the Holley and Hayter's responses to the trial judge's inquiries. The court then applied the well-settled and conventional Witherspoon standard and reached a conclusion consistent with this Court's decisions including Adams. (People v. Lanphear, supra, 26 Cal.3d at pp. 840-844.) Not one justice disagreed with the finding that Witherspoon error did in fact occur. (Cf. People v. Velasquez (1980) 26 Cal.3d 425, 445-447 wherein the court was split 4-3 as to whether prospective juror Mrs. Rundee had been excluded in violation of Witherspoon.)[4/]

The unanimity of the California Supreme Court's decision strongly suggests that this is not a proper case upon which to squander this Court's certiorari jurisdiction. Accordingly, the petition should be denied.

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4. On June 30, 1980 this Court granted certiorari in People v. Velasquez (1980) 26 Cal.3d 425 and remanded that case for further consideration in light of Adams v. Texas, 48 U.S.L.W. 4869 (U.S., June 25, 1980). California v. Velasquez, No. 79-1677, 48 U.S.L.W. 3849.)

ALTERNATIVELY, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE HELD WITHOUT ACTION PENDING THE CALIFORNIA SUPREME COURT'S DECISION IN PEOPLE V. VELASQUEZ ON REMAND (CALIFORNIA V. VELASQUEZ, NO. 79-1677, 48 U.S.L.W. 3849)

Should this Court determine that the California Supreme Court viewed its decision in this case as controlled in all aspects by People v. Velasquez (1980) 26 Cal.3d 425, a view to which respondent does not ascribe, then the instant case should be held without action pending the California Supreme Court's decision in Velasquez on remand.

The petitions for writ of certiorari filed by the State of California here and in Velasquez are virtually identical, as were petitioner's requests for stays of the execution and enforcement of the judgments in these matters.

On June 30, 1980 this Court granted certiorari in Velasquez and remanded that case to the California Supreme Court for further consideration in light of Adams v. Texas, 48 U.S.L.W. 4869 (U.S., June 25, 1980). (California v. Velasquez, 48 U.S.L.W. 3849.) The question now is whether the same course should be followed here.

Admittedly, symmetry could be achieved by doing so. But such symmetry would be mechanistic; and we submit that it would also be inefficient.

This Court has already asked the California Supreme Court to take another look at Velasquez after Adams. Nothing but the waste of courts' and litigants' time and money would be achieved by sending another case back for identical treatment with the first. We therefore respectfully suggest that the present certiorari petition be held without action pending the California Supreme Court's decision of Velasquez on remand, and this Court's disposition of the second Velasquez certiorari petition which is foreordained to follow that decision whichever

way it may go.

After the final resolution of the Velasquez case in the California Supreme Court and in this Court, the parties to the present Lanphear case can file supplemental briefs under rule 22.6 of the Rules of the United States Supreme Court (adopted April 14, 1980; effective June 30, 1980) specifying reasons for or against review of Lanphear in the light of Velasquez. But so long as Velasquez is undergoing further consideration, no informed or orderly analysis of those reasons can be made by either the parties or this Court.

Dated this 18th day of July, 1980, at Los Angeles, California.

Respectfully submitted,

QUIN DENVIR
California State Public Defender

By Edward H. Schulman
EDWARD H. SCHULMAN
Deputy State Public Defender
Member, Bar of the Supreme
Court of the United States

Attorneys for Respondent

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, RONALD EUGENE LANPHEAR, by and through his counsel, asks leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California without prepayment of costs and to proceed in forma pauperis pursuant to rule 46 of the United States Supreme Court Rules (amended April 14, 1980, effective June 30, 1980) and 28 USC 1915.

Respondent has at all times during the pendency of the above-referenced matter in the trial and appellate courts of the State of California been represented by appointed counsel due to respondent's indigency.

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The respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

QUIN DENVIR
State Public Defender

By Edward H. Schulman
EDWARD H. SCHULMAN
Deputy State Public Defender

Attorneys for Respondent

INDEX

	Page
Prayer	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Additional Statement of the Case	2-5
Reasons for Denying the Writ	6-8

Cases:

Doyle v. Ohio, 426 U.S. 610 (1976)

Jenkins v. Anderson, ___ U.S. ___, 27 Cr. L. 3147 (1980)

Lebowitz v. Florida, 429 U.S. 808 (1976)

Lebowitz v. State, Fla. App., 313 So. 2d 473 (1975)

Middleton v. South Carolina, 429 U.S. 807 (1976)

Raffel v. United States, 271 U.S. 494 (1926)

State v. Middleton, 266 So. C. 251, 222 S.E. 2d 763 (1976)

United States v. Hale, 422 U.S. 171 (1975)

United States ex rel. Smith v. Rowe, 618 F. 2d 1204 (7th Cir. 1980)

Conclusion	9